Legal Policy and Access to Justice Through Courts and Mediation

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I. INTRODUCTION

Alternative dispute resolution (ADR) gained momentum in the late 1970s at the same time that scholars world-wide were beginning to examine problems of access to justice.[1] Although ADR has continued to grow in prominence during the past two decades, the incipient access to justice movement appears to have withered away. Nonetheless, the two issues remain linked in complex ways. The linkages reveal differing views of justice and raise difficult challenges for legal policy about mediation that are the concerns of this Essay.

Early critiques of mediation and ADR challenged these informal processes as "second class justice."[2] From this perspective, mediation programs were largely aimed at the poor and disadvantaged, diverting them away from courts where they had rights and where procedural protections gave them a chance to prevail against more advantaged parties. This critique relies on a view of justice as the vindication of legally defined rights through formal and public procedures. Legal policies[3] that block access to courts where those rights presumably are vindicated thus demand scrutiny. Mediation programs are particularly suspect when they are mandatory and when mediation imposes costs on participants that may diminish their capacity to pursue litigation.

However, at the same time, and as part of the broad examination of

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[1] *See generally* ACCESS TO JUSTICE (Mauro Cappelletti & Bryant Garth eds., 1978).

[2] *See* JONATHAN B. MARKS ET AL., DISPUTE RESOLUTION IN AMERICA 51–52 (1984) (reviewing commentary making this argument); Richard L. Delgado et al., *Fairness and Formality: Minimizing the Risks of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1402 (discussing the risk of prejudice in ADR); Richard Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, *in* 1 THE POLITICS OF INFORMAL JUSTICE 167 (Richard L. Abel ed., 1982).

[3] As used in this Article, the term "legal policies" will refer to laws, regulations, local rules and contractual clauses.

access to justice, some scholars and practitioners have challenged the presumptions of rights-based notions of justice.[4] In doing so, they have also raised questions about the capacity of courts and formal adjudicatory processes to deliver justice. From these perspectives, justice entails empowerment of individuals to shape decisions about their own lives and conflicts on terms that are meaningful to them. The standards for decisions are not necessarily legal rights and entitlements, and the procedures for empowerment typically are informal rather than formal ones with procedural safeguards. From this viewpoint, the central issue of access to justice involves access to a process like mediation, not to courts. It is in mediation, in this view, where disputants presumably have the power to participate actively, and to decide outcomes and the criteria for them themselves.

Differing views of justice and of the best forums for achieving it thus suggest the possibility of divergent approaches to legal policies concerned both with access and mediation. Analysis of these policies is further complicated by observations of the ways that parties perceive and use varying disputing processes and the manner in which they actually work. Indeed, the access to justice movement arose because of the observation that in practice courts are often costly and slow, intimidate and confuse parties by their formal procedures, may advantage parties with resources and experience and deliver outcomes that seem not to reflect the interests or values of any of the parties.[5] Further, there is substantial evidence that many people with legal needs or problems do not pursue them through the

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[4] *See generally* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994) (describing the process of mediation as a transformative one); Deborah M. Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1997); Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985) (criticizing the "caricaturization" of ADR); Sally E. Merry, *Albie M. Davis: Community Mediation as Community Organizing*, *in* WHEN TALK WORKS: PROFILES OF MEDIATORS 245 (Deborah M. Kolb et al. eds., 1994) (discussing Davis's vision of ADR as an opportunity for party empowerment).

[5] Such observations were articulated by Roscoe Pound in *The Causes of Popular Dissatisfaction with Administration of Justice*, 35 F.R.D. 273 (1906). *See also* Mauro Cappelletti & Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report*, *in* 1 ACCESS TO JUSTICE, *supra* note 1, at 10; Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 525, 561 (1974).

law at all.[6] Yet, we also have evidence that parties to disputes are often reluctant to undertake mediation, even if it is available at no charge to them.[7] At the same time, substantial research evidence suggests that parties are more likely to view mediation as "procedurally just" and satisfying when compared with adjudication or other settlement processes.[8] When we ask, thus, not only about idealized visions of courts and of mediation, but also about how they actually work in practice, we find evidence that bears importantly on the meaning of access and of legal policies to promote it in its multiple meanings.

Many—but not all—of the questions about access to justice revolve around the extent and nature of public funding of mediation. These questions in turn have to do with our conception of the public justice system. If adjudication provides the single model for justice, then the public justice system should provide the opportunity to present a case to a judge at a minimum cost to parties. The current public justice system seems to rely on this model—even if it falls short of realizing it in practice—by imposing modest entry costs through filing fees on parties undertaking lawsuits and presumably thereby providing them access to judicial determination of their controversies. Frank Sander offered another model of the public justice system, that of the Multi-Door Courthouse, in which a single entry fee provides access not only to adjudication but also to other processes including mediation and arbitration.[9] If the alternative processes demand less reliance on expensive legal counsel, then they may in fact diminish cost barriers to access to justice. At the same time, providing alternatives to

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[6] *See* Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 L. & SOC'Y REV. 525, 561 (1980–1981). *See generally* BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY (1977).

[7] *See* Wayne D. Brazil, *Institutionalizing Court ADR Programs*, *in* EMERGING ADR ISSUES IN STATE AND FEDERAL COURTS 122–124 (1991); David E. Matz, *Why Disputes Don't Go to Mediation*, 17 MEDIATION Q. 3, 3 (1987); Sally E. Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151–152 (1984). *See generally* Craig A. McEwen & Thomas W. Milburn, *Examining a Paradox of Mediation*, 9 NEGOTIATION J. 23 (1993).

[8] *See* NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY & PRACTICE §§ 4:06–4:08 (2d ed. 1994); Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOTIATION J. 259, 267 (1996).

[9] *See* Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 130–132 (1976).

courts at low or no cost to parties requires either public funding or donation of dispute resolution services.

This Article takes up each of these issues in greater detail. Part II reviews legal policies that decrease access to mediation. Part III examines legal policies regarding mediation that limit party access to the courtroom. In Part IV, this Article reviews policies which overcome barriers to access. Part V briefly explores some of the issues surrounding the public costs of access to justice. In conclusion, this Article argues for a carefully crafted balance in legal policies that may promote meaningful access to mediation while not posing burdens on parties that prevent appropriate use of the courts.

II. WHAT LEGAL POLICIES PREVENT ACCESS TO JUSTICE IN/OR THROUGH MEDIATION?

Many would argue today that mediation provides "first class justice" and that an increasingly important issue of access revolves around the availability of mediation,[10] especially to low and moderate income disputants.[11] When we view the problem of access this way, we have a new angle of approach to legal policies about mediation. This perspective is made more complex when we recognize that mediation takes many different forms, some of which may do more to provide parties with a sense of justice than do others.[12] The variability of mediation leads us to ask whether legal policy should be attentive not to access to mediation in general, but rather to access to particular kinds of mediation that do more to enable parties to participate actively in the resolution of their own disputes.

Costs to parties pose the clearest barrier to access to mediation, just as

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[10] For related discussion of the use of mediation, see Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831 (1998).

[11] *See* Kimberlee K. Kovach, *Costs of Mediation: Whose Responsibility?*, 15 MEDIATION Q. 5, 23 (1997).

[12] For general discussion and commentary about variations in mediation, see Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997); Leonard L. Riskin, *Understanding Mediator's Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediation Orientations: Piercing the "Grid" Lock*, 24 FLA. ST. U. L. REV. 985 (1997).

they create the most obvious barrier to formal law and courts. However, other less obvious barriers exist as well. Some legal rules may have the indirect effect of increasing the cost of mediation or diminishing the diversity of mediator pools and thus accessibility to mediation by various groups. Rules that make mediation voluntary rather than compulsory may also diminish access indirectly, as do rules and programs that tie eligibility for mediation to prior initiation of a lawsuit. Finally, when mediation develops in ways that make lawyers, not parties, the key actors in the process, it may offer little access to meaningful participation and thus to a sense of justice.

Legal policies that bear on the costs of mediation and who pays them play a significant role in access. The potential of cost barriers is indirectly heightened by policies that produce reliance on the private marketplace for mediation services rather than either public provision or volunteer service. The costs of mediators' services, and thus the barriers they pose to access, would also seem likely to be increased by legal policies that set highly restrictive qualifications for mediators.[13] For example, Alfini describes Florida's experience with mediation and makes clear that the highest party costs for mediation are borne in circuit court civil cases, in large part because certified mediators are uniquely limited in such cases to experienced lawyers or retired judges.[14] Restrictive qualifications may also narrow the diversity of mediators and promote cultural and linguistic barriers to mediation.[15]

In practice, the cost barriers to mediation presumably vary according to the type of case and the relative expense of mediation in relation to the total transaction costs of parties in litigation as well as to the amounts of money that may be in dispute. For many commercial litigants, for example, the marginal costs of mediation may be relatively low. For private litigants and for contingent fee lawyers representing parties in "ordinary litigation,"[16] however, the costs of mediation may weigh more heavily. For parties

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[13] *See generally* Rogers & McEwen, *supra* note 10.

[14] James J. Alfini, *Trashing, Bashing and Hashing It Out: Is This the End of "Good Mediation?,"* 19 FLA. ST. U. L. REV. 47, 53, 56–59 (1991).

[15] *See* ROGERS & MCEWEN, *supra* note 8, § 6:09; Bruce E. Barnes, *Conflict Resolution Across Cultures: A Hawaii Perspective and a Pacific Mediation Model*, 12 MEDIATION Q. 117, 117–118 (1994).

[16] For example, Kritzer reported that over half of state civil suits involved stakes (perceived by lawyers) under $5000. *See* HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 20 (1991).

engaged in a divorce that may cost $1500 per person for attorney's fees, an additional $500 or $1000 for mediator's fees could impose a substantial burden. It would be an even greater burden for many of the apparent majority of divorcing parties that either choose not to or cannot afford to employ legal counsel.[17] In small claims cases, parties would have little incentive to pay for mediation costs that could easily match or exceed the amounts of money at stake. Moreover, making mediation available at market rates presumably will do little to provide access to some forum for resolving disputes for the many people who find the formal legal system inaccessible because of cost. Thus, the costs of mediation are likely to have varying impacts on access to mediation for different kinds of cases.

Additionally, legal rules that emphasize voluntary use of mediation can reinforce barriers to access. While one party can force another to respond to a lawsuit, in the absence of a mandate to use mediation, one party cannot require the other to sit down to talk about settlement. There are many barriers to negotiation that may prevent one or both parties to a dispute from initiating or engaging the process meaningfully.[18] While mediation can help overcome most of these once it is underway, these barriers often make parties reluctant to initiate mediation. Wayne Brazil, for example, argues that inertia, overload of cases, inattention to planning negotiation, strategic concerns about appearing weak and attorney fears about loss of control over the case work against voluntary participation in mediation.[19] Mandatory mediation overcomes these barriers to entry without substantially reducing the likelihood of settlements or party satisfaction with the process.[20]

Further limits to access arise if publicly supported mediation becomes available only after the initiation of a lawsuit. For parties unwilling or unable to undertake formal legal proceedings, access to mediation is then effectively eliminated.

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[17] *See generally* JOHN GOERDT, DIVORCE COURTS: CASE MANAGEMENT, CASE CHARACTERISTICS, AND THE PACE OF LITIGATION IN 16 URBAN JURISDICTIONS (1992); Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 L. & SOC'Y REV. 149, 154 (1994).

[18] *See generally* Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993) (discussing "strategic," "principal/agent," "cognitive" and "reactive devaluative" barriers to conflict resolution).

[19] *See* Brazil, *supra* note 7, at 122.

[20] *See* ROGERS & MCEWEN, *supra* note 8, § 6:04.

Other legal policies may be implicated if we think of access not simply in terms of the availability of any form of mediation, but more specifically as access to a mediation process that permits active party participation in the resolution of a dispute on their own terms. When mediation comes to resemble settlement conferences—run by mediators rather than judges—it may advance efficiency goals, but do very little to promote party participation and empowerment.[21] Professor Alfini's observations of Florida mediators in civil cases provide a vision of varying mediator styles, including two that are suggestive of settlement work by judges.[22] Despite powerful advocacy for interest-based mediation involving parties, lawyers often appear to strongly prefer those mediators who provide evaluations of their cases and thereby help to pressure parties to settle.[23] It appears to be easier to identify the potential problems of access to mediation, however, than to locate either their causes or solution in legal policies.

III. WHAT LEGAL POLICIES REGARDING MEDIATION CREATE BARRIERS TO ACCESS TO JUSTICE IN THE COURTROOM?

In increasing numbers of jurisdictions across the country, the formula for a party seeking access to justice has become some combination of mediation and courtroom adjudication.[24] Consequently, it is not surprising that many of the legal policies that create, shape, direct and grant access to mediation programs also impact access to the courtroom. When barriers to courtrooms are created, disputants may be left with the choice of access to justice through mediation only or no choice of access to justice in any form. For those for whom adjudication is the desired model of justice, these barriers to access to justice in the courtroom are troubling.

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[21] Evidence from a study by the Rand Corporation comparing adjudication, arbitration and settlement conferences with judges makes clear that parties find settlement conferences the least "procedurally just," in large part because of their lack of participation in the process. *See* E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANT'S VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 79 (1989).

[22] Alfini describes "trashers" as those who attack each parties' legal arguments and "bashers" as those who are not attentive to the substance of the dispute, but rather who focus on pressuring parties to find a middle ground in dollar demands and offers for settlement. *See* Alfini, *supra* note 14, at 66–71.

[23] *See id.* at 62; McEwen et al., *supra* note 17, at 164–167.

[24] *See generally* ROGERS & MCEWEN, *supra* note 8.

Mediation made mandatory through laws, regulations, rules or contractual clauses can in some instances keep parties from having their day in court. Generally, advocates of mediation look kindly upon mandated mediation because it brings parties and lawyers to the table to observe first hand and to reap mediation's benefits.[25] From a Multi-Door Courthouse[26] perspective, if a party has arrived at the mediation table, that party has the opportunity to seek justice in one of its many forms. However, the party who seeks a day in the *courtroom*, not just in the *courthouse*, may find that mandated mediation under some conditions creates barriers to access. When mediation is a prerequisite to courtroom access or to proceeding in the courtroom past a certain point in litigation, the legal policies which shape that mediation must be examined to ensure that mediating parties are not blocked from ever proceeding or returning to the courtroom.

A. *Financial Cost*

The financial cost of mediation for the parties can create a huge barrier, both to access to the mediation itself, as discussed in Part II, and to access to justice in the courtroom. The financial cost of mediation may determine whether the parties can continue on to court if the mediation does not produce settlement. The single most important factor in determining the parties' financial cost in mediation is whether legal policies require that parties pay for the mediation session. Also critical to the financial cost of the mediation for the parties is whether they wish to be represented by counsel in the mediation and, if so, the cost of such representation. Any administrative costs associated with mediation, such as filing fees, also add to the cost of the mediation for the parties.

When mediation is mandatory and the parties are required to pay for the mediation session, a barrier to access to the courtroom is created if the total cost of going to mediation consumes a significant part of the dispute resolution budgets of either or both parties. Faced with burdensome mediation session costs, a party not mandated to mediation might choose to forgo mediation and spend limited funds on courtroom adjudication. However, going directly to the courtroom is not an option when participation in mediation is mandated before courtroom access is allowed.

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[25] *See generally* Rogers & McEwen, *supra* note 10. *See also* text accompanying note 20.

[26] *See generally* Sander, *supra* note 9.

Under such circumstances, the party with a limited dispute resolution budget is pressured to settle in mediation.

Many factors determine the financial cost of the mediation session. As discussed in Part II, legal policies that produce reliance on the private marketplace for mandated mediation services rather than either public provision or volunteer service tend to hike the cost. Within the private marketplace, cost is shaped by the manner in which a mediator's time is charged: hourly, per day or half day or per case. Legal policies that set highly restrictive qualifications for mediators are another culprit in the increase of the cost of mediation sessions.[27] All of these factors impact the financial cost of the mediation sessions and therefore impact courtroom access for parties who are required to pay for the mediation sessions.

A barrier to access to justice in the courtroom may be created when mediation is mandatory and a party desires the representation of counsel in that mediation. Paying attorney's fees for representation in mediation may exhaust the dispute resolution budget that a party would have used to pay for courtroom adjudication (such as attorney's fees for court, and time away from employment). In such a scenario, a party is faced with a tough choice. In order to preserve the dispute resolution budget needed to continue on to court, the party may go to mediation without the counsel he feels is necessary. In the alternative, the party may go to mediation with the desired representation of counsel, but the dispute must be settled in mediation because attorney's fees for mediation will consume the party's dispute resolution budget.

B. *Time Cost*

For a party with limited time resources, a legal policy that mandates mediation before a court may create a different barrier to access to justice in the courtroom. If a party has time for only one justice process, and mediation is the mandated first step to access justice, mediation becomes that party's first and only chance for justice. If the party desires access to justice in the courtroom, mandating mediation first creates a barrier to the preferred form of justice.

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[27] *See supra* notes 13 and 14 and accompanying text.

C. *Settlement Pressure in Mediation*

Barriers to access to justice in the courtroom are created if the parties to a dispute are pressured, directly or indirectly, to settle the dispute in mediation, thereby eliminating the need and the opportunity to seek justice in the courtroom. Any attempt to avoid such settlement pressures and go directly to court is blocked if mediation is mandatory before court access is available.

Direct pressure to reach settlement in mediation, and therefore never to go to court, is created when parties face penalties if the trial outcome does not exceed by a certain amount the proposed mediation settlement.[28] Legal policies which mandate mediation before court, combined with Michigan-style penalty statutes which make continuing on to court a financial risk, create a powerful incentive to accept whatever outcome can be achieved in mediation.

Direct pressure to reach settlement in mediation may also be created by legal policies which direct or allow the mediator to report to the trial judge on the mediation process or to recommend a trial outcome.[29] Knowledge of such open communication between mediator and trier of fact might persuade a party who is considering mediation to go directly to court so as not to risk facing a biased judge. Of course, if mediation is the prerequisite to court, a party's access to an unbiased judge at trial is eliminated when such communication occurs. It can be argued that access to a biased trier of fact is not true access to justice in the courtroom.

Once again, a system in which the parties pay for the mediation session must come under scrutiny if the cost of the session accrues other than on a per case basis. A party who is mindful of a ticking cost meter for the mediation session may feel pressure to settle the mediation to stop her costs from mounting. For that party, the party-pay mandated mediation becomes a barrier to access to justice in the courtroom.

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[28] *See, e.g.*, MICH. L. CT. R. 403.15-16 (Wayne County); MICH. GEN. CT. R. 316.7. This type of pressure to settle will be referred to hereinafter as "Michigan-style."

[29] *See, e.g.*, CAL. FAM. CODE § 3183 (West 1994).

IV. OVERCOMING BARRIERS TO MEDIATION AND TO ACCESS TO JUSTICE IN THE COURTROOM

How can legal policies overcome barriers to mediation and to access to justice in the courtroom? As previously discussed, legal policies that shape mediation programs often also impact disputants' future access to justice in the courtroom. Consequently, we must examine the effects of policies on the mediation programs which they govern and on any future attempts by disputants to get into court. To overcome barriers to access, legal policies would have to address the financial and time costs of mediation, availability of mediation prior to litigation, cultural barriers to use of mediation, pressures against entering mediation in the course of litigation, pressures to settle in mediation, the nature of mediation services provided and mandated mediation. Each of these issues will be examined in turn.

If financial costs are a barrier to mediation and to the courtroom, then limiting those costs will increase access to both forums for justice. Public provision of mediation service at little cost obviously provides the greatest access. For example, California counties make mediation available in divorce cases without charge to the parties, although funding for mediation comes from earmarked surcharges on marriage licenses.[30] In Maine, small claims mediation is provided at no charge to parties by mediators employed contractually by a Court Alternative Dispute Resolution Service (CADRES) but is supported by a surcharge on the filing fee for all small claims litigants.[31] Florida small claims courts provide mediation services through community volunteer programs at no cost to parties. These examples of no-fee (direct) provision of mediation occur in kinds of cases where the costs of mediation to parties are likely to be most burdensome and create the greatest barriers to access.

Another option is to fix the costs of mediation by providing either a capped fee or a standard charge for its use or by establishing sliding scales based on ability to pay. Maine charges parties $120 for divorce mediation through CADRES and mediators are paid $50 per mediation session for their work.[32] In Hawaii and Montana, fees for mediators are established by

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[30] *See* ELIZABETH PLAPINGER & MARGARET SHAW, COURT ADR: ELEMENTS OF PROGRAM DESIGN 46 (1992).

[31] *See* Telephone Interview with Diane Kenty, Director of Maine's Court Alternative Dispute Resolution Service (Jan. 16, 1998).

[32] *See id.*

statute.[33] In Florida circuit courts, according to Alfini, judges set the mediation fee when they order it, usually at $125 per hour, but mediators can set their own fees when parties seek them out voluntarily.[34]

Waiver of fees for those parties who can demonstrate that their incomes are below a certain cut-off has also been proposed as a way to deal with cost barriers to mediation access and to postmediation courtroom access.[35] Means-testing for eligibility of free mediation services necessarily excludes many with modest resources that do not quite qualify. Sliding scale charges may be another mechanism for provision of mediation services. Marilyn McKnight, for example, reports on a Minnesota program to bring divorce mediation services to rural, low-income and culturally diverse populations using sliding fee schedules.[36] Unlike fee waivers, these schedules are not legally mandated, however, but reflect the commitment of local mediation groups. Another strategy to provide mediation services to those most in need is to require by statute or court rules that mediators who serve on court rosters or are certified by courts offer a certain number of hours of pro bono service.[37]

Both to increase access to mediation generally and to permit use of mediation without the necessity of court filing and referral, some states have actively supported the development of community mediation centers which provide mediation at limited or no fee whether parties have filed lawsuits or not.[38] It is less clear how legal policies can deal with cultural barriers to access to mediation. Some statutes, such as the California law encouraging counties to develop dispute resolution programs, indicate the aspiration to deal with access and diversity issues: "Local resources, including volunteers reflective of the diversity of the community and available public buildings should be utilized to achieve more accessible, cost-effective dispute resolution."[39] The transformation of such aspirations

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[33] *See* HAW. REV. STAT. § 672, 673 (1985); MONT. CODE ANN. § 27-6-203 (1993).

[34] *See* Alfini, *supra* note 14, at 58.

[35] Diane Kenty reports that for budgetary purposes she estimates that 10% of divorce mediations will involve a waiver of the modest ($120) mediation fee. *See* Telephone Interview with Diane Kenty, *supra* note 31.

[36] *See* Marilyn McKnight, *Access to Mediation Services for Rural, Low-Income, and Culturally Diverse Populations*, 15 MEDIATION Q. 29, 40 (1997).

[37] *See* Kovach, supra note 11, at 23.

[38] *See, e.g.*, N.Y. JUD. LAW § 849 (McKinney 1985).

[39] CAL. BUS. & PROF. CODE § 465(c) (West 1990).

into practice may come through funding decisions that tie resources to local program efforts to achieve such goals in practice. However, such local achievements could easily be blocked by legal policies that set qualification standards that effectively diminish the diversity of mediator pools. Further efforts to deal with barriers to access arising from cultural differences in views of disputing may best be dealt with, not by legal rules, but by the implementation of mediation training and adaptation of mediation approaches to reflect the needs of diverse groups in local communities.[40]

Mandatory mediation is both friend and foe to access to justice. Legal policies supporting mandatory mediation promise to enlarge access to mediation, while at the same time creating certain barriers to access to the courtroom raised in Part III of this Article. Clearly, a careful balancing of conceptions of access is necessary in making decisions about mandatory mediation.

Mandatory mediation increases the use of mediation,[41] in part by overcoming social psychological and strategic barriers to undertaking the process.[42] For example, parties who are reluctant to initiate settlement discussions for fear of showing weakness may find a mandate to use mediation provides them access to a process they could not easily enter on their own. At times, one party can hold the other hostage by refusing to enter into serious negotiation. Mandatory mediation can at least bring the parties to the table under such circumstances.

Mandatory mediation decreases access to courtroom justice when combined with some program features such as the requirement that the parties pay for the mediation, or direct pressures to settle the dispute in mediation. The fact that mediation is mandated before access to court is allowed can create time costs for a party that make continuing on to court impossible. Solutions that allow for an opt-out from mandatory mediation effectively reduce access to mediation, however.[43] Therefore, it is preferable to develop options that open up access other than by allowing parties to opt-out of mandatory mediation because of cost concerns. The suggested solutions to financial barriers to access, discussed above, preserve access to mediation in such situations.

Barriers to courtroom access that are created when pressures to settle

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[40] *See, e.g.*, Barnes, *supra* note 15, at 118.

[41] *See generally* Rogers & McEwen, *supra* note 10.

[42] *See* Mnookin, *supra* note 18, at 238.

[43] *See* Thomas W. Weeks, *Legal Service Providers and Dispute Resolution: A Conversation*, DISP. RESOL. MAG., Fall 1995, at 3 (1996).

are strong in mandated mediation can be eliminated by removing the direct settlement pressure. Mediation is not a fair process when strong settlement pressures effectively remove a disputant's choice of whether or not to settle.[44] Certainly any court caseload-reduction benefits of Michigan-style mediation are far outweighed by the gross unfairness of forcing a party in mediation to take a huge financial gamble if she wishes to access justice in the courtroom. Gross unfairness, as well as a subversion of the essence of mediation, exists in a mediation program where the mediator reports to and influences the trier of fact if the case continues on to the courtroom. Elimination of these direct pressures to settle eliminates a barrier to access to the courtroom. However, in programs where these settlement pressures remain, the barriers to courtroom access could be reduced if the mandate were flexible and allowed an opt-out from mediation. Parties then could make a choice between mediation or the courtroom. While this solution would satisfy a party desirous of courtroom access, a party wishing to use mediation still would be left with access to a tainted mediation process.

Parties with limited time resources which permit participation in only one justice process are denied courtroom access when mediation is mandated before court. Flexibility in the mandate is the only solution to this barrier to access. An exception to a mandatory mediation requirement which creates a good cause opt-out would give a party with limited time resources the opportunity to petition for her preference of justice in the courtroom.[45]

Legal policies may be directed not only at opening up access to mediation, but also at shaping the character of the mediation process itself. On the one hand, some states like Kansas permit mediators to "allow only the parties to attend the mediation sessions," presumably in order to highlight their participation and to prevent lawyers from dominating the process.[46] Research evidence from the divorce context challenges the assumption that lawyers will necessarily "spoil" mediation for the parties although Lande argues that it may be true under some circumstances.[47]

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[44] *See generally* Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909 (1998).

[45] *See* COLO. REV. STAT. § 13-22-311(1) (1997).

[46] KAN. STAT. ANN. § 23-603(a)(6) (1995); *see also* CAL. FAM. CODE § 3182 (1994); WIS. STAT. ANN. § 767.11(10)(a) (1993); FLA. R. CIV. P. § 1.720(d) (West Supp. 1998).

[47] *See* Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1364

However, as noted earlier, restrictions on lawyer participation may also create pressures to settle that effectively limit access to adjudication. Given the important balancing between fairness and access to a party-controlled mediation process, exclusion of lawyers is neither necessary nor appropriate as a way to achieve access.

A second approach to shaping the character of the mediation process by legal policy has been taken recently by Florida, which prohibits certified and court-appointed mediators from giving opinions as to "how the court . . . will resolve the dispute."[48] It is not clear what effects, if any, that efforts to prevent evaluative mediation have on the practice of mediation. However, prohibitions of evaluations would be difficult to enforce, especially if lawyers participating in mediation expect and value views of the merits of cases by mediators. These views could easily be disclosed as the views of the mediator, not predictions of judicial decisions. Efforts to shape the content of mediation by rule conflict with aspirations to leave mediation as free from constraint as possible, so as to encourage flexibility and creativity in the process. Although the form of mediation is important to the experience of justice by the parties, legal policy is not the instrument to shape the form mediation takes.

V. PUBLIC COSTS AND ACCESS TO JUSTICE

Insuring access to justice is a costly proposition, whether that access is to the courts or to mediation. But who will bear those costs?[49] The options appear to be limited to: users of mediation services, potential users, taxpayers generally or mediators through volunteer service. Reliance on volunteers or on broadly or narrowly defined user fees diminish or eliminate the costs of mediation borne by the general taxpayer. The clear balance that needs to be struck is between universal access paid for out of tax dollars—perhaps an unrealistic aspiration in today's political climate—and a private market where only those with substantial resources can find

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(1995). *But see* John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 903, 925 (1997).

[48] FLA. STAT. ANN. MEDIATOR R. 10.090(d) (West 1997). *But see* IND. CODE ANN. § 4-21.5-3.5-19 (West Supp. 1997) (taking the opposite position by permitting mediators to evaluate cases).

[49] For discussions of funding mediation programs, see generally ROGERS & MCEWEN, *supra* note 8, § 6:34; Kovach, *supra* note 10; Frank E.A. Sander, *Paying for ADR*, 78 A.B.A. J. 105 (1992).

mediation services.

The public costs of mediation are minimized when parties are required to pay the price of the service. At one extreme, that means reliance on an unregulated private marketplace, but in practice it may mean some fee capping as in Florida. We have seen the potential risks that such strategies pose to access both to courts and to mediation.

Fewer concerns about access to mediation arise when some large group of potential users pays surtaxes into a fund dedicated to providing mediation services. Thus, California and Florida counties are authorized by law to add surcharges to civil filing fees in order to fund mediation programs.[50] California spreads costs even further by creating a surcharge on marriage license applicants to fund divorce mediation.[51] When surcharges are small, they probably have little effect on limiting access, but when they are larger (e.g., Florida charges up to $45 for a petition for modification of a final divorce judgment)[52] concerns about limiting access increase.

Reliance on volunteers is another way to minimize costs to the public while increasing access to mediation. Community mediation programs, many of which deal with small claims cases and take other court referrals, typically rely heavily on volunteers, although they still require substantial resources for training and administration. New Hampshire has operated a mandatory alternative dispute resolution requirement in its civil courts for five years, relying on lawyer volunteers to provide neutral evaluation, mediation and arbitration services.[53] The District of Columbia Circuit Court of Appeals relies on a pool of lawyers to provide volunteer mediation services.[54]

Like fees, volunteer service falls along a continuum, from entirely unpaid mediators to those who may receive modest or token compensation. For example, for small claims cases, Maine utilizes mediators who are not quite volunteers—instead, they provide their services at very low fees, $50 a half day.[55] The Northern District of Ohio combines pro bono with capped

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[50] *See* CAL. BUS. & PROF. CODE § 470.3 (West 1990); FLA. STAT. ANN. § 44.108 (West 1998).

[51] *See generally* PLAPINGER & SHAW, *supra* note 30.

[52] *See* FLA. STAT. ANN § 44.108(c) (West 1998).

[53] *See* N.H. SUPER. CT. R. 170 (1992).

[54] *See* Chief Judge Harry T. Edwards, *Report of Chief Judge Harry T. Edwards*, *in* 1995 ANNUAL REPORT FOR THE D.C. CIRCUIT 28 (1995).

[55] *See* Telephone Interview with Diane Kenty, *supra* note 31.

fee service, providing free service of volunteer lawyer-mediators for up to 4.5 hours and then requiring parties to pay for additional time at the rate of $150 per hour.[56]

Such options suggest the potential for use of volunteers, but there are limits to relying on them as well. When the demand on volunteers is substantial, the potential for burn-out increases significantly, and the maintenance of a high quality volunteer service over time may prove difficult and labor intensive. Minimizing that burn-out may also involve making few demands on volunteers, especially for training. Settlement Week, for example, may require as little as a half day of mediation training for their lawyer volunteers, although the lack of training may not diminish the quality of the mediation provided.[57]

In addition to these practical concerns, some advocates of mediation contend that, in principle, mediators should be paid for the work they do, in part as a measure of the value placed by society on the enterprise and in part as an incentive to draw into the work talented people who take it seriously and do it well.[58] Further, some argue that parties will take mediation more seriously if they have some financial investment in it.[59]

VI. SUMMARY AND CONCLUSION

Access to justice has different meanings with varying and potentially contradictory implications for legal policies regarding mediation. If access to justice means availability of procedures to make a legal determination of rights and obligations, it must be protected by legal policies that do not increase burdens on parties or pressure settlements. If access to justice means availability of mediation to all parties, it requires legal policies that fund mediation services and that effectively make them available to

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[56] *See* U.S. DISTRICT CT., N.D. OHIO R. 7:1.4(c)(1) (1996).

[57] Settlement Weeks typically are arranged by courts once a year and bring in large numbers of lawyer volunteers to mediate civil cases, especially ones that have long been on the docket. *See* CHARLES PADDOCK, SETTLEMENT WEEK: A PRACTICAL MANUAL FOR RESOLVING CIVIL CASES (1990). Evidence from Settlement Week settlement rates indicate that they are unrelated to the amount of training of the mediator. *See* Roselle L. Wissler, *Mediation in Settlement Week: Empirical Research*, DISP. RESOL. MAG. (forthcoming 1998) (on file with author). Of course, some would argue that settlement rates tell little about the quality of mediation.

[58] *See* Sander, *supra* note 49, at 105.

[59] *See* Kovach, *supra* note 11, at 18.

disputants. Since access means both, legal policies regarding mediation should reflect a fine balance when the two views lead to opposing policies and an effort to maximize both forms of access when they are not in conflict, while recognizing other values as well, such as fairness, efficiency and quality.[60]

Legal policies regarding mediation must be especially attentive to the costs of the process to participants. On the one hand, these costs may be affected by legal policies that demand particular qualifications that narrow the pool of available mediators and drive up their prices. If states are to realize the goal of diverse (and low cost) rosters of mediators, care needs to be taken to avoid setting qualifications that diminish that diversity substantially and without significant gains for quality. Costs may also be higher when the unregulated private marketplace becomes the sole source of mediation services. On the other hand, policies that regulate fees, provide public subsidies for mediation services or spread costs among a large number of potential users help to diminish barriers to access based on cost. Such policies also serve to diminish the burden of mediation on parties and thus help to reduce potential limits on access to courts. In times of scarce public resources, it is especially important to recognize that certain kinds of cases are more likely to pose issues of access and to focus attention on those arenas—for example, family law and small or modest claims in civil litigation—where the cost of mediation poses the greatest likelihood of a problem.

Our analysis of access issues suggests the need for careful balancing in considering legal polices regarding mandates. On the one hand, mandatory mediation creates risks of imposing burdens on parties that may diminish access to the courts. On the other hand, mandates help overcome barriers to the use of mediation that effectively increase access to it and implicitly increase (or should increase) public commitment to support mediation services. With appropriate safeguards—low cost, attorney participation, no reports to triers of fact and appropriate opt-out provisions—mandates do not significantly hinder access to courts while enlarging access to mediation.

Efforts to shape the character of the mediation process itself and thus of access to full party participation in the resolution of disputes appear not to be amenable to control by legal policy. Here the caution is to avoid doing harm. Efforts to keep lawyers out of mediation sessions, for example, will

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[60] *See* ROGERS & MCEWEN, *supra* note 8, §§ 7:01–7:09.

do little to shape the mediation process, but may do much to diminish its fairness. Attempts to prohibit predictions of what courts will do are difficult to enforce and seem unlikely to have much effect on the character of party participation in mediation. Ultimately, the nature of mediation will be most affected by the character of training and the climate of expectations for mediators and mediation among those who run mediation programs and those who participate in mediation sessions.